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No. 07-1309

In the Supreme Court of the United States

EDMUND BOYLE, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether, in order to establish the existence of an "enterprise" within the meaning of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq*., the government must prove the existence of an entity with an ascertainable structure apart from the pattern of racketeering activity in which its members engage.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-4a) is not published in the Federal Reporter but is available at 283 Fed. Appx. 825.

JURISDICTION

The judgment of the court of appeals was entered on November 19, 2007. On February 6, 2008, Justice Ginsburg extended the time within which to file a petition for a writ of certiorari to and including April 17, 2008, and the petition was filed on April 15, 2008. The petition for a writ of certiorari was granted on October 1, 2008. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of racketeering, in violation of 18 U.S.C. 1962(c); conspiracy to commit racketeering, in violation of 18 U.S.C. 1962(d); conspiracy to commit bank burglary, in violation of 18 U.S.C. 371; and eight counts of bank burglary or attempted bank burglary, in violation of 18 U.S.C. 2113(a). He was sentenced to 151 months of imprisonment. The court of appeals affirmed his conviction, but vacated his sentence and remanded for resentencing. Pet. App. 1a-4a.

1. Petitioner was a member of a group of individuals who engaged in a series of organized, multi-jurisdictional bank thefts over ten years, using stealth and force to rob financial institutions in numerous locations including, among others, New York City, Long Island, upstate New York, New Jersey, Ohio, and Wisconsin. See, *e.g.*, J.A. 51, 56; Tr. 282-283, 366, 382-383.

Each member of the group not only had to be capable of committing the crimes but also had to be trusted. J.A. 41; Tr. 211, 664-665. The group's hub was a "social club" in Brooklyn owned by one of their own, Tommy Dono. J.A. 58, 74-75. The group, which engaged in criminal acts from 1991 through 1999, maintained a core of members throughout its existence, while recruiting new associates as needed when members were incarcerated or moved away. J.A. 51, 88-90; Tr. 663-664, 817.

a. The group's bank-theft operations primarily targeted bank night-deposit boxes. Salvatore "Fat Sal" Mangiavillano first originated the scheme of stealing from such locations, Tr. 41, 744, and he instructed the other members of the group how to carry out the thefts. J.A. 88-89; Tr. 211-212. Those thefts followed a similar

pattern. After scouting for banks likely to have vulnerable and cash-rich night-deposit boxes, J.A. 34, 55-56; Tr. 305, 317-318, 339, 434, 437, typically located in retail areas, like shopping malls, J.A. 55; Tr. 343, 366-373, 439-441, the group would normally execute robberies in the early morning hours at the beginning of the week after cash deposits had accumulated over the weekend. J.A. 32, 34; Tr. 372-373.

Several members of the group participated in each theft. One associate would assume the role of "organizer" and assemble the participants for a theft or series of thefts. J.A. 72-78. Before Mangiavillano's imprisonment for bank burglary in 1996, he ordinarily assumed that role. J.A. 90-92; see Tr. 828-829. The participating members would meet to plan their operations in advance. J.A. 75-76, 83-84, 90-91. After the planning was complete, the members would assemble the tools needed to execute the plan, Tr. 666, including crowbars, hammers, screwdrivers, ratchet sets, flashlights, chains, and fishing gaffs, as well as walkie-talkies and police scanners. J.A. 33, 38, 60, 62-63, 66-67; Tr. 339, 349-350, 383.

Each member was assigned to fill a particular role in executing each plan. J.A. 32; Tr. 665. Some acted as lookouts, either in a car or on foot. J.A. 32, 36, 38, 61, 67; Tr. 359-360. The lookouts utilized scanners to monitor police radio frequencies and walkie-talkies to communicate with other group members and warn them if police were in the vicinity. J.A. 32-33, 38, 61-62, 65-68; Tr. 782. Once the lookouts had assumed their positions, two to three members of the group would drive to the bank and attempt to detach the night-deposit box by removing the screws from its face plate, prying it off the wall with a crowbar, or attaching a chain from a car to the box and pulling the box off the wall. J.A. 32-33; Tr.

299, 317-318, 334, 339, 359-360, 443-448. Once the associates had created a hole in the bank's wall by detaching the box, they would remove the deposit bags inside the bank by hand or with a fishing gaff or similar device. J.A. 37, 63; Tr. 322. The group then would split the proceeds among the participants in the burglary—sometimes evenly and sometimes with those who removed the box receiving a larger percentage in order to compensate them for the additional risk that they assumed in the operation. J.A. 64, 79; Tr. 455, 528-529. Many of the night-deposit-box thefts were quite successful, with the group netting anywhere from thousands to hundreds of thousands of dollars in each bank theft. J.A. 36-38; Tr. 282-283, 300, 305-306, 379-380, 390, 455; see J.A. 53; Tr. 474, 819.

The group also attempted bank-vault burglaries and bank robberies, though these were far less frequent than the night-deposit-box thefts. Before executing a bank-vault operation, group members conducted surveillance of the targeted bank and gathered the requisite tools such as special cutting tools, industrial-strength drills, blow torches, gas tanks, water hoses, and walkie-talkies. Tr. 769-771, 774-777. The bank-vault burglaries occurred in the early morning hours when the banks were closed. On the day of a burglary, approximately five or six members of the group would drive to the bank. See *ibid.* As with the night-deposit-box operations, certain members would act as lookouts, using walkie-talkies. Tr. 771, 777. Others would try to gain entry into the bank (often by breaking through a bank wall), and, then, from inside the bank, they would attempt to drill directly into the bank's vault. Tr. 771-772, 777-778.

b. From 1991 to 1994, the core of the group, which committed more than 30 night-deposit-box thefts, consisted of Mangiavillano, Tommy Dono, Beck Fiseku, Chris Ludwigsen, William Galloway, and Gerard Bellafiore (until Bellafiore was imprisoned for bank burglary). J.A. 35, 52-53, 88-90; Tr. 45-47, 299-302; cf. J.A. 35 (estimating 25-30 burglaries in 1991). Petitioner was initially asked to join one of the group's bank vault robberies because the group "needed extra help" on this operation and Mangiavillano knew petitioner to be a reliable car thief from prior criminal collaborations. Tr. 765-768. Petitioner accepted and, by 1994, petitioner had participated in at least two attempted bank-vault burglaries with Mangiavillano, Dono, Fiseku, and others, J.A. 86; Tr. 766-779, as well as an attempted night-deposit-box theft with Mangiavillano, Dono, and others, Tr. 779-782; J.A. 87-88.

In 1994, the group briefly expanded their operations by planning and executing a robbery of the National Westminister Bank (NatWest) in Brooklyn. Mangiavillano, Fiseku, Ludwigsen, and petitioner were equal partners in the venture. Tr. 85, 92, 167-170. The participants played the various roles of driver, lookout, and robbers, and they obtained approximately $900,000 from the bank heist, which they divided evenly amongst themselves. *Ibid.*; Tr. 807-808; see Tr. 86-92, 222-223, 233, 417-432, 790-798, 801-802, 808-809. Approximately six months later, Ludwigsen moved to Florida. Tr. 62-63. Other group members attempted to duplicate the NatWest success at two other banks, but they were unsuccessful. Tr. 812-814.[1]

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[1] While petitioner asserts (Br. 16) that the jury "hung" on the NatWest bank robbery, the record reflects that district court instructed the

Around 1996, petitioner, Mangiavillano, Dono, and another attempted a night-deposit-box theft on Long Island. Tr. 817-818. Mangiavillano was imprisoned for bank burglary later that year and was subsequently deported. Tr. 828-829. In 1997, petitioner, Dono, John Micali, and two others were arrested for possessing burglar's tools, Tr. 693-715, and Bellafiore returned to prison for committing additional bank thefts, Tr. 302. From 1998 to 1999, the group, which now, in addition to petitioner, Dono, Fiseku, and Bellafiore, included Micali and Ronald Petrino as core members, committed or attempted to commit numerous night-deposit-box thefts in New York, New Jersey, Ohio, and Wisconsin. Tr. 310-318, 320-325, 330-384, 396-408, 433-438, 738-742, 1140-1144; Gov. C.A. Br. 14-19.

2. a. On September 9, 2003, a federal grand jury indicted petitioner and other members of the group. After every defendant except petitioner, Dono, and Petrino entered guilty pleas, the grand jury returned a superseding indictment for the remaining defendants. Superseding Indictment (Jan. 6, 2005).[2] That indictment charged petitioner with participating in the conduct of the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c); conspiring to commit that offense, in violation of 18 U.S.C.

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jury that it need not reach a decision on that predicate act if it found two or more other racketeering predicates warranting petitioner's conviction on RICO charges. Tr. 1484. The jury found petitioner guilty on the RICO counts, leaving the verdict form blank with respect to the NatWest predicate. Tr. 1491; cf. J.A. 15-18; Tr. 1520-1521 (assessing RICO forfeiture). The NatWest evidence was available for the jury to use in finding the existence of an enterprise.

[2] Dono and Petrino entered guilty pleas shortly thereafter. See Dist. Ct. Docket entry (Jan. 25, 2005).

1962(d); bank burglary conspiracy, in violation of 18 U.S.C. 371; and nine counts of bank burglary and attempted bank burglary, in violation of 18 U.S.C. 2113(a). J.A. 14-25 (redacted superseding indictment).

Section 1962(c), which Congress enacted as part of the Racketeering Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq*., provides:

> It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

18 U.S.C. 1962(c).

RICO also contains statutory definitions for several terms, including "pattern of racketeering activity" and "enterprise." 18 U.S.C. 1961. A "pattern of racketeering activity" requires at least two acts of "racketeering activity," which the Act defines to mean any of the predicate offenses specifically enumerated in Section 1961(1). 18 U.S.C. 1961(5). In addition, the predicate offenses must be "related" and must "amount to or pose a threat of continued criminal activity" in order to constitute a "pattern" of racketeering activity. *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 239 (1989); see *id.* at 240-243. The indictment alleged that petitioner participated in the conduct of the affairs of an enterprise though a pattern of racketeering activity that consisted of, *inter alia*, predicate acts of interstate transportation of stolen night-deposit-box funds. J.A. 15-18.

The indictment further alleged that the "enterprise" with which petitioner was associated was "a group of

individuals associated in fact" who "functioned as a continuing unit for [the] common purpose" of "generating money" through "criminal activity, including bank robberies, bank burglaries and interstate transportation of stolen money." J.A. 13-14.

RICO provides that the term "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). In *United States* v. *Turkette*, 452 U.S. 576 (1981), this Court explained that "an enterprise includes any union or group of individuals associated in fact" and concluded that the term includes "a group of persons associated together for a common purpose of engaging in a course of conduct" whether that conduct be lawful or criminal. *Id.* at 580, 583. The Court further ruled that the existence of such an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Id.* at 583.

b. Tracking the language of RICO and *Turkette*, the district court instructed the jury that "the term 'enterprise' includes any individual, partnership, corporation, association or other legal entity, and any union or group of individuals associated in fact although not a legal entity." J.A. 111. An enterprise, the court explained, may therefore consist of "an informal association of individuals" who "'associate' together for a purpose of engaging in a course of conduct" even if the association is not "a form[al] business entity such as a corporation" and "is not recognized as a legal entity." *Ibid.*

The district court stated that "you may find an enterprise where an association of individuals, without structural hierarchy, forms solely for the purpose of carrying

out a pattern of racketeering acts. Such an association of persons may be established by evidence showing an ongoing organization, formal or informal, and * * * by evidence that the people making up the association functioned as a continuing unit." J.A. 112. "Common sense suggests that the existence of an association-in-fact is oftentimes more readily proven by what is does, rather than by abstract analysis of its structure." J.A. 111-112.

Finally, the court instructed the jury that, "in order to establish the existence of such an enterprise, the government must prove that: (1) there is an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives; and (2) the various members and associates of the association function as a continuing unit to achieve a common purpose." J.A. 112. With respect to the "organization" prong of this test, the court explained that "it is not necessary that the enterprise have any particular or formal structure, but it must have sufficient organization that its members functioned and operated in a coordinated manner in order to carry out the alleged common purpose or purposes of the enterprise." J.A. 112-113.

Petitioner objected, *inter alia*, to the court's instruction that an enterprise could be established "without structural hierarchy" and that the enterprise's organization need not "have any particular or formal structure." J.A. 103-104. Petitioner requested that the district court instead instruct the jury that the government must prove beyond a reasonable doubt that the enterprise "had an ongoing organization, a core membership that functioned as a continuing unit, and an ascertainable structural hierarchy distinct from the charged predicate acts." J.A. 95; C.A. App. A683. The district

court declined to incorporate petitioner's proposed language. See J.A. 111-113.

The jury acquitted petitioner on one bank burglary count (Count Four) but found petitioner guilty on the remaining 11 counts. J.A. 7. The district court sentenced petitioner to 151 months of imprisonment. J.A. 10.

4. The court of appeals affirmed petitioner's convictions but vacated his sentence. Pet. App. 1a-4a.

Petitioner argued on appeal that the district court erred, *inter alia*, in declining to instruct the jury that the government must establish that an association-in-fact enterprise under RICO must have "an ascertainable structural hierarchy distinct from the charged predicate acts." Pet. C.A. Br. 19-20 (emphasis omitted). The court of appeals did not specifically discuss that issue, stating instead that it had considered petitioner's "challenges to the judgment of conviction" and found them "without merit." Pet. App. 3a. The court of appeals vacated petitioner's sentence for reasons not pertinent here, and it remanded for resentencing. *Id.* at 3a-4a.

5. On remand, the district court credited petitioner for 33 months of imprisonment that petitioner served on a New York state burglary conviction and otherwise reimposed the same sentence. Amended Judgment (Apr. 18, 2008). Petitioner's appeal from that judgment is currently pending before the court of appeals.

SUMMARY OF ARGUMENT

The court of appeals correctly rejected petitioner's contention (Br. 19-20) that a group of individuals associated in fact to conduct criminal activity must have some "particular or formal structure" apart from the pattern of racketeering activity in which its members engage in

order to constitute an "enterprise" under RICO. Cf. J.A. 103-104. RICO's text and structure demonstrate that Congress defined "enterprise" broadly to include a wide range of both formal and informal associative groups. When the common purpose of such a group is to pursue criminal acts, a criminal "enterprise" can exist even if the group does not display an "ascertainable structure beyond that inherent in the commission" of those crimes (Pet. i). The evidence in this case amply illustrates such an enterprise.

Congress defined "enterprise" broadly to "include[]" "any" legal entity (including "any individual, partnership, corporation, [or] association") and "any union or group of individuals associated in fact" that lacks a recognized legal existence. 18 U.S.C. 1961(4). That definition embraces a "group of individuals associated in fact" whose members are "associated together a common purpose of engaging in a [criminal] course of conduct" and who form a "formal or informal" organization whose members "function as a continuing unit." *United States* v. *Turkette*, 452 U.S. 576, 583 (1981).

Nothing in RICO's text suggests that a criminal association-in-fact must possess an ascertainable structure beyond that inherent in its members' coordinated criminal activity. Indeed, the essence of such an association is the common purpose that binds its members and prompts them to function as a unit over time to commit crimes. Petitioner's extra-textual restriction on RICO's "enterprise" concept is inconsistent with Congress's use of expansive language in Section 1961(4), which imposes "no restriction upon the associations embraced by [that] definition." *Turkette*, 452 U.S. at 580. As this Court has recognized, RICO targets criminal associations that "extend well beyond" those traditionally understood as

"organized crime" in order to apply to "a wide range of criminal activity, taking many different forms" and involving "a broad array of perpetrators operating in many different ways." *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 243, 248-249 (1989).

An association-in-fact may be composed of as few as two members. It would therefore be anomalous for Congress to have intended that such a group must reflect the formalistic structure suggested by petitioner. Two-person enterprises do not require decision-making protocols, command structure, or fixed roles to operate effectively to pursue a common objective. Moreover, Congress expressly provided that "any individual" may constitute an enterprise. If an individual qualifies as an enterprise under RICO, there is no sound reason to conclude that an "ascertainable structure" is essential to RICO's enterprise concept. Indeed, elsewhere in the act that enacted RICO, Congress explicitly addressed the structure of an enterprise needed to trigger criminal liability, see 18 U.S.C. 1955(b)(1)(ii), but included no analogous language in RICO to limit the scope of its enterprise definition. There is no reason to disregard that presumably conscious decision in drafting RICO by importing the kind of amorphous "ascertainable structure" requirement suggested by petitioner.

Petitioner is incorrect in his suggestion that an ascertainable structure requirement is needed to avoid merging the "enterprise" concept into a RICO's "pattern of racketeering activity." An enterprise may exist absent such a pattern where, for instance, a criminal group forms to pursue non-racketeering activities. Likewise, an individual can commit a pattern of racketeering activity with a changing pool of confederates who might not form an association-in-fact. And, even

when an individual participates in the conduct of the affairs of an enterprise by engaging in a pattern of racketeering, that pattern standing alone may not demonstrate the existence of the enterprise. Of course, when two or more persons associate together to coordinate their actions to commit jointly a series of related racketeering crimes that either extend over a substantial period of time or threaten such continued activity, their coordinated activities can reflect both the existence of an "enterprise" and a "pattern" of racketeering activity. *Turkette* recognized that the evidence of those elements may "coalesce" in particular cases without merging those distinct elements into one. 452 U.S. at 583.

Petitioner's limited textual analysis does not support his conclusion that an "enterprise" must have an "ascertainable structure" beyond that reflected in its activities. The phrase "group of individuals associated in fact although not a legal entity" does not in itself suggest any structural requirement. Likewise, the antecedent types of enterprises in Section 1961(4) do not imply that the "group" must be structured. Finally, the fact that RICO's title includes the word "organizations" provides no basis for restricting the broad text employed by Congress to define "enterprise." RICO's purpose and legislative history similarly focus on the need to combat "organized crime," but this Court has concluded that Congress, for cogent reasons, enacted a much broader statute that extended well beyond organized crime to capture a wide range of criminal activity taking many different forms. RICO's broad definition of "enterprise," which includes "any" "group of individuals associated in fact," accordingly imposes no structural requirement beyond that which is inherent in a group's ongoing and coordinated conduct of racketeering activity.

Petitioner's reliance on the rule of lenity and principles of constitutional avoidance are misplaced because the statute is broad, not ambiguous. And rules to avoid asserted ambiguity or constitutional concerns cannot justify adding a far more ambiguous extra-textual gloss of "ascertainable structure," which petitioner himself is incapable of defining with any precision.

Applying the correct test, the jury was correctly instructed and the evidence sufficed to support the finding of an enterprise. Petitioner and his confederates planned a series of bank heists, played various roles in carrying out their *modus operandi*, made decisions collectively, and functioned as a coordinated unit over a period of several years. Nothing more was needed to establish an enterprise for purposes of RICO.

ARGUMENT

PETITIONER'S RICO CONVICTIONS SHOULD BE AFFIRMED BECAUSE A RICO ENTERPRISE EXISTS WHEN A CONTINUING UNIT OF INDIVIDUALS, EVEN WITHOUT ADDITIONAL ASCERTAINABLE STRUCTURE, FORMS FOR THE PURPOSE OF CARRYING OUT A PATTERN OF RACKETEERING ACTIVITY

Congress has made it unlawful under RICO for any person "associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce" to "conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity." 18 U.S.C. 1962(c). RICO's definitional section provides that, as used in the Act, the term "'enterprise' includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1961(4). Con-

trary to petitioner's contention, an enterprise may be established, as this Court stated in *United States* v. *Turkette*, 452 U.S. 576, 583 (1981), based on proof of an association with a "common purpose" to engage in an activity, in which the associates "function as a continuing unit." No ascertainable structure need exist apart from and in addition to such proof. Accordingly, the jury instructions in this case were correct in stating that neither "structural hierarchy" nor a "particular or formal structure" is required, J.A. 112, and the evidence on this point overwhelmingly supports petitioner's convictions.

I. AN ILLICIT RICO ENTERPRISE NEED NOT HAVE AN ASCERTAINABLE STRUCTURE SO LONG AS IT IS AN ONGOING ORGANIZATION WHOSE ASSOCIATES FUNCTION AS AN ONGOING UNIT

The language and structure of RICO demonstrate that an "enterprise" includes "a group of persons associated together for a common purpose of engaging in a course of [criminal] conduct" who "function as a continuing unit." *Turkette*, 452 U.S. at 583. The "ascertainable structure" requirement that petitioner would impose has no foundation in RICO's text or logic and is inconsistent with the decisions of this Court repeatedly refusing to engraft such extra-textual limitations into RICO's deliberately expansive statutory provisions.

A. The Language And Structure Of RICO Demonstrate That An "Enterprise" Need Not Possesses An Independent Ascertainable Structure

1. RICO's definition of "enterprise" contains no "ascertainable structure" qualification

For nearly three decades, this Court has concluded that RICO imposes "*no restriction* upon the associations embraced by the definition" of "enterprise" because "an enterprise includes *any* union or group of individuals associated in fact." *Turkette*, 452 U.S. at 580 (emphases added); accord *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 260-261 (1994) (*NOW*) (construing "enterprise"). "[R]ead naturally, the word 'any' has an expansive meaning, that is, 'one or some indiscriminately of whatever kind,'" *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 835-836 (2008) (quoting *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997)), and Section 1961(4) employs the term not once but twice: first, to include "any * * * legal entity" within its definition of enterprise and, second, to include "any union or group of individuals associated in fact," 18 U.S.C. 1961(4), that lacks such a "legal existence." See *Turkette*, 452 U.S. at 582 & n.4.[3]

The phrase "group of individuals associated in fact," 18 U.S.C. 1961(4), demonstrates the breadth of RICO's

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[3] This Court has read the term "any" narrowly in circumstances where the statutory context included a term of art that "compelled that result," where another statutory term "made sense only under [such] a narrow reading," and where the "clear statement rule" required for waivers of sovereign immunity made a more limited reading appropriate. *Ali*, 128 S. Ct. at 836 n.4. This Court's recognition that RICO's text imposes "no restriction" upon the associations included in the in the definition of "enterprise" (*Turkette*, 452 U.S. at 580), however, reflects that no such consideration here warrants departing from the normal, expansive meaning of "any."

"enterprise" concept. A "group" of individuals naturally is understood as encompassing "a number of individuals bound together by a community of interest, purpose, or function" and, thus, includes a collection of individuals "associated formally or informally for a common end." *Webster's Third New International Dictionary* 1004 (1993) (principal copyright 1961). The verb "associate," moreover, is commonly used to "signif[y] confederacy or union for a particular purpose, good or ill," such that an "association" of individuals logically is understood as "a collection of persons who have joined together for a certain object." *Black's Law Dictionary* 156 (rev. 4th ed. 1968). Under the commonly understood meanings of those terms, individuals may "associate" in a "group" regardless whether the resulting entity has any particular ascertainable structure.

Consistent with that understanding of those terms, this Court in *Turkette* held that RICO's definition of "enterprise" encompasses "a group of persons associated together for a common purpose of engaging in a course of conduct" regardless whether that conduct is lawful or criminal. 452 U.S. at 583. The Court additionally explained that the existence of such an enterprise "is proved by evidence of an ongoing organization, formal or informal, and by evidence that the various associates function as a continuing unit." *Ibid.* That focus on the coordinated actions of the group's members (*i.e.*, their functioning as a unit) and the recognition that an enterprise includes an informal organization illustrate that a criminal "enterprise" under RICO need not have any ascertainable structure beyond that implicit in its associates' pursuit of their common goal of engaging in a (criminal) course of conduct.

Indeed, *Turkette* explained that the proof used to establish a "series of criminal acts * * * of racketeering committed by the participants in the enterprise" and the proof needed to establish the existence of a RICO "enterprise" itself "may in particular cases coalesce." 452 U.S. at 583. Proof of a pattern of racketeering activity may not always establish an enterprise. *Ibid.*; see pp. 26-28, *infra*. But the fact that proof of those two elements may coalesce shows that *Turkette*, like the statutory text of Section 1961(4), does not contemplate that a RICO "enterprise" is limited by petitioners' extra-textual requirement for an "ascertainable structure" *beyond* that reflected in the coordinated conduct of the enterprise's affairs.

That conclusion comports with the reality of "informal" associations of individuals. A group of individuals may constitute an associative "organization"—*i.e*, be able to assemble and coordinate their activities to carry out common objectives over a period of time—without having any discernible management structure. As suggested by the Court's use of the phrase "formal or informal" in *Turkette*, an association-in-fact enterprise may have a leader who runs its operations or it may operate by the informal consensus of its members; it may hold group meetings according to a schedule or it may conduct its business informally by telephone as the need arises; it may have an established headquarters or no tangible address; and each member may play a defined role in its operations or its members may alternate roles. The structural make-up of a group of individuals may be strong *evidence* of the existence of an enterprise. But, as the Court recognized in *Turkette*, the essence of an association-in-fact enterprise is not its formality or internal configuration, but its ability to pursue a com-

mon objective on an ongoing basis as a cohesive unit.[4] Such an ability may be proved by a wide variety of direct or circumstantial evidence having nothing to do with a group's structure.[5]

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[4] Petitioner argues that, as used in *Turkette*, the word "organization" (which does not appear in RICO's operative text) denotes a structured entity. See Br. 27-28. But that definition does not account for *Turkette*'s characterization of an association-in-fact enterprise as an "organization" that may be either "formal *or informal.*" And, while the word "organization" may be defined with reference to the structure of an association of individuals, it may also be defined with reference to the association's common purpose. See *The Random House Dictionary of the English Language* 1364 (2d ed. 1987) (defining "organization" as "a group of persons organized for some end or work; association"); *The American Heritage Dictionary of the English Language* 1239 (4th ed. 2006) (defining "organization" as "[a] group of persons organized for a particular purpose; an association"). That understanding, rather that petitioner's, parallels *Turkette*'s focus on the "common purpose" of an association's members rather than its structure. 452 U.S. at 583.

[5] See, *e.g.*, *United States* v. *Nascimento*, 491 F.3d 25, 33 (1st Cir. 2007) (street gang "exhibited group cohesion over time; its membership pooled and shared resources; the individuals involved had a sense of belonging and self-identified as [gang] members; and the group had a well-honed set of goals"), cert. denied, 128 S. Ct. 1738 (2008); *United States* v. *Owens*, 167 F.3d 739, 751 (1st Cir.) (members of drug trafficking organization provided other members with financial assistance and coordinated transportation of drugs), cert. denied, 528 U.S. 894 (1999); *United States* v. *Richardson*, 167 F.3d 621, 625 (D.C. Cir.) ("Additional evidence of [the enterprise's] organization and continuity comes from the robberies' consistent pattern."), cert. denied, 528 U.S. 895 (1999); *United States* v. *Davidson*, 122 F.3d 531, 535 (8th Cir.) ("The length of these associations, the number and variety of crimes the group jointly committed, and Davidson's financial support of his underlings demonstrates an ongoing association with a common purpose to reap the economic rewards flowing from the crimes, rather than a series of ad hoc relationships."), cert. denied, 522 U.S. 1034 (1997), and 523 U.S. 1033 (1998); *United States* v. *Doherty*, 867 F.2d 47, 68 (1st Cir.) (Breyer, J.) ("The number of acts, their relationship, their having taken place over

While a "group" composed of a large number of individuals might be more likely to possess such structure in order to coordinate the efforts of its members, Section 1961(4) encompasses "any" associative "group," which, in the absence of a textual restriction, may be composed of as few as two members. Cf. *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 452 (1989) (discussing "group of two or more persons"). Congress could not have intended that such smaller association-in-fact enterprises must always include structural elements like those suggested by petitioner. Cf. Pet. Br. 33 (listing ascertainable decision-making "protocol," an identifiable chain of command, and "differentiated" roles to implementing decisions as examples of a "measure of structure"). Two-person enterprises do not require such attributes in order to operate effectively, and they would not necessarily be expected to display them. That conclusion is reinforced by the fact that Congress made it unlawful to participate in the conduct of the affairs of "any enterprise" through a pattern of racketeering activity, 18 U.S.C. 1962(c), and defined "enterprise" to include "any individual," 18 U.S.C. 1961(4). An "individual" enterprise inherently cannot have indicia of structure. There is no sound reason why Congress would

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several years, and the consistent participation of the central figures in the scheme show a 'group of persons associated together for a common purpose of engaging in a [criminal] course of conduct.'") (brackets in original), cert. denied, 492 U.S. 918 (1989); *United States* v. *Perholtz*, 842 F.2d 343, 355 (D.C. Cir.) ("The interlocking nature of the schemes and the overlapping nature of the wrongdoing provides sufficient evidence for the jury to conclude that this was a single enterprise."), cert. denied, 488 U.S. 821 (1988); *United States* v. *Qaoud*, 777 F.2d 1105, 1117 (6th Cir. 1985) (finding existence of enterprise established by "[t]he coordinated nature of the defendants' activity"), cert. denied, 475 U.S. 1098 (1986).

have provided that a RICO enterprise may consist of an individual, but not of a group of individuals who engage in acts with a common criminal purpose as a continuing unit, which like a single individual, lacks an ascertainable structure.

Petitioner's position is further undermined by the fact that Congress explicitly addressed the question of size and structure in the illegal gambling statute, 18 U.S.C. 1955, which it enacted with RICO as part of the Organized Crime Control Act of 1970 (OCCA), Pub. L. No. 91-452, 84 Stat. 922. The gambling statute makes it a crime to conduct an "illegal gambling business." 18 U.S.C. 1955(a). Unlike RICO, however, Section 1955 defines an "illegal gambling business" to mean a gambling business that, among other things, "involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business." 18 U.S.C. 1955(b)(1)(ii); see also 21 U.S.C. 848(c) (defining size and managerial characteristics of a "continuing criminal enterprise").

Petitioner himself concedes (Br. 51 n.40) that Section 1955 demonstrates that "Congress knows how to impose an express structure requirement when it wants to." If Congress had intended to require a RICO enterprise to have an ascertainable structure, it presumably would have followed a similar course and addressed the subject directly.[6] Yet, while Section 1961 contains extensive definitional provisions for the key terms in RICO, it offers

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[6] Cf. *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 244 (1989) (if Congress had intended to limit RICO's coverage to organized crime, it would have "explicitly [so] stated"); *NOW*, 510 U.S. at 261 (similar; rejecting "economic motive" requirement for "enterprise"); *Turkette*, 452 U.S. at 581 (similar; declining to restrict "enterprise" to legitimate entities).

no guidance whatever for defining petitioner's proffered concept of "ascertainable structure." The "absence of any reference to * * * [such structure]—much less any definition of the [term]—is strong evidence that Congress did not intend to make * * * [an ascertainable structure] an element of a * * * [RICO] violation." *United States* v. *Culbert*, 435 U.S. 371, 373 (1978).

Petitioner's suggestion (Br. 51 n.40) that "Congress had to paint more broadly" in RICO because Section 1955 targets a much narrower scope of activity, even if accurate, fails to account for RICO's complete textual silence on the subject. In RICO contexts where textual support was similarly unavailable, this Court has "repeatedly refused to adopt narrowing constructions of RICO in order to make it conform to a preconceived notion of what Congress intended to proscribe." *Bridge* v. *Phoenix Bond & Indem. Co.*, 128 S. Ct. 2131, 2145 (2008) (citing cases); see, *e.g.*, *NOW*, 510 U.S. at 260-261 (refusing to adopt economic-motive limitation for a RICO "enterprise" where "Congress has not, either in the definitional section or in the operative language, required that an 'enterprise' in § 1962(c) have an economic motive"); *Turkette*, 452 U.S. at 580-581 (declining to "depart[] from and limit[]" the statutory definition of "enterprise" to legitimate entities because the definition imposes "no restriction upon the associations embraced by [its terms]" and Congress could have, but did not, "narrow[] the sweep of the definition by inserting" text to that effect).

Petitioner's notion of an "ascertainable structure" requirement not only lacks textual foundation, it also reflects an indefinite concept that petitioner himself is unable to define. Petitioner offers several vague formulations in his brief of an "ascertainable structure" re-

quirement. See, *e.g.*, Br. 15 ("An identifiable structure requirement * * * contemplat[es] some ongoing directional apparatus, though not the reticulation of, say, a corporation or Mafia family."); Br. 29 (jury can sometimes "infer some independent organization from the nature, frequency and duration of the predicate acts," but, in other cases, "additional evidence of structure will be necessary"). He also offers examples of "[a] measure of structure," including "a protocol for taking decisions; a chain of command for communicating them; and/or differentiated role players to carry them out," which, he asserts "mak[es] the test clear and comprehensible." Br. 33. Those attempts to articulate petitioner's nontextual requirement amply illustrate that "structure" "is hardly a self-defining term" and will only compound confusion. See *H.J. Inc.* v. *Northwestern Bell Tel. Co.*, 492 U.S. 229, 241 n.3 (1989). In contrast, in the district court, petitioner emphasized a requirement of "an ascertainable structural *hierarchy* distinct from the charged predicate acts." J.A. 95 (emphasis added). Whatever clarity might be offered by a strict requirement of "structural hierarchy," petitioner no longer seems to espouse that limitation, advocating instead more expansive descriptions of "structure" that find no support in RICO's text.

Engrafting petitioner's restrictive "structure" requirement onto Section 1961(4) also would run contrary to this Court's long-standing admonition that "RICO is to be read broadly." *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 497 (1985) (*Sedima*). "RICO was an aggressive initiative to supplement all remedies and develop new methods for fighting crime," *id.* at 498, and, while Congress intended the Act to be used to combat organized crime, "Congress for cogent reasons chose to en-

act a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime." *H.J. Inc.*, 492 U.S. at 248; accord *NOW*, 510 U.S. at 260.

RICO's drafters thus "followed a 'pattern [of] utilizing terms and concepts of breadth,'" *H.J. Inc.*, 492 U.S. at 237 (quoting *Russello* v. *United States*, 464 U.S. 16, 21 (1983)), and followed that practice in adopting the definition of "enterprise." *Russello*, 464 U.S. at 21; see *NOW*, 510 U.S. at 257 ("RICO broadly defines "enterprise."); *Turkette*, 452 U.S. at 580-581. The statute accordingly targets criminal associations that "extend well beyond[] those traditionally grouped under the phrase 'organized crime'" in order to apply to "a wide range of criminal activity, taking many different forms" and involving "a broad array of perpetrators operating in many different ways." *H.J. Inc.*, 492 U.S. at 243, 248-249; see *NOW*, 510 U.S. at 262 ("The fact that RICO has been applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.") (quoting *Sedima*, 473 U.S. at 499). Petitioner's extra-textual "ascertainable structure" requirement is incompatible with Congress's conception of a RICO enterprise. In short, Congress itself imposed "no restriction upon the associations embraced by" RICO's definition of "enterprise," *Turkette*, 452 U.S. at 580, and it is not this Court's role to impose such a restriction for Congress.

2. A RICO "enterprise" and a "pattern of racketeering activity" are distinct concepts that do not merge

Notwithstanding the textual breadth of Section 1961(4), petitioner contends that a RICO enterprise must have "some sort of structure beyond that attending the pattern of racketeering activity * * * in which its participants engage" because, without that restriction, the term "enterprise" will merge into the "pattern" and be rendered "wholly 'superfluous.'" Br. 4, 10-11, 39-40. Petitioner is incorrect.

a. This Court in *Turkette* rejected a similar argument. *Turkette* explained that an enterprise is an "entity," there, as here, a "group of persons associated together for a common purpose of engaging in a course of conduct." 452 U.S. at 583. Even when the enterprise and the related course of conduct are purely criminal, the Court concluded that the "entity" (the enterprise) is necessarily distinct from the "series of criminal acts" committed by its associates (the pattern). *Ibid.* As a formal matter, the "entity" and the "acts" of its members can never merge: "The 'enterprise' * * * is an entity separate and apart from the pattern of activity." *Ibid.* Moreover, as *Turkette* recognized, neither concept is superfluous in practice because it is entirely conceivable that a requisite "enterprise" or "pattern" will exist without the other. *Ibid.* ("[P]roof of one does not necessarily establish the other.").

A criminal association-in-fact "enterprise" exists as an "entity" when a continuing unit of individuals associate in order to achieve an illegal end. *Turkette*, 452 U.S. at 583. The "enterprise may exist even if its membership changes over time." *United States* v. *Perholtz*, 842 F.2d 343, 364 (D.C. Cir.), cert. denied, 488 U.S. 821

(1988).[7] A "pattern of racketeering activity," in turn, is present only if several criteria are met. The pattern must, first, involve a series of two or more predicate acts of "racketeering activity," 18 U.S.C. 1961(5), with only a discrete subset of all criminal offenses qualifying as such. See 18 U.S.C. 1961(1) (specifically enumerating the crimes qualifying as "racketeering activity"). In addition, multiple racketeering acts themselves do not constitute a "pattern" of racketeering activity unless those acts are both "related" to each other and "amount to or pose a threat of continued criminal activity." *H.J. Inc.*, 492 U.S. at 239.

The fact a group of individuals may associate in fact and function as an ongoing unit to achieve a particular criminal end (thereby creating an "enterprise") thus will not give rise to a "pattern" of "racketeering activity" if those individuals commit offenses other than those specifically enumerated in Section 1961(1) or their offenses are either insufficiently related or insufficiently persistent to threaten continuing racketeering activity. Conversely, a "pattern of racketeering activity" can exist in the absence of an association-in-fact "enterprise." Suppose that an individual commits a series of similar bank robberies over several years, in each case using a different cast of associates to carry out the roles of decoy,

[7] See also, *e.g.*, *United States* v. *Smith*, 413 F.3d 1253, 1267 (10th Cir. 2005) (ruling that an enterprise may exist as a continuing unit "even if some individuals left [it] and were replaced by new members at a later date"), cert. denied, 546 U.S. 1120 (2006); *United States* v. *Nabors*, 45 F.3d 238, 241 (8th Cir. 1995) ("[T]he personnel of an enterprise may undergo alteration without loss of the enterprise's identity as an enterprise."); *United States* v. *Hewes*, 729 F.2d 1302, 1317 (11th Cir. 1984) ("The law does not require all members of the RICO enterprise to have maintained their association with it throughout the enterprise's life."), cert. denied, 469 U.S. 1110 (1985).

lookout, and getaway-car driver. The crimes may readily form a "pattern," by exhibiting both continuity and relationship. But the shifting personnel, with only one common member for each crime, would not constitute an enterprise: the criminals would not form an organization pursuing a common purpose and functioning as a continuing unit. Accordingly, proof establishing a "pattern" of racketeering activity does not necessarily establish an "enterprise."[8]

b. Of course, if a group of individuals who join together formally or informally for the common purpose of engaging in a pattern of racketeering activity and, functioning as a criminal unit, actually achieve that end by jointly completing a pattern of racketeering, those individuals will have created an association-in-fact "entity" through their actions. In addition, any group member who "participates" in the conduct of such an entity's affairs "through a pattern of racketeering activity" will violate Section 1962(c) if the affairs of the enterprise affect interstate or foreign commerce. See 18 U.S.C. 1962(c). That result, however, simply reflects that the actions of the group as a whole and the criminal defendant have established the "enterprise" and "pattern" elements of a Section 1962(c) offense. It may well be true that, when a multi-member association-in-fact exists to commit crimes and their crimes form a RICO "pattern," a jury could always infer the existence of an enterprise. But that result would not require manipula-

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[8] In contrast, if a core group of associates carries out similar crimes over time, with certain personnel changing during the life of their activities, the existence of that core group pursuing a common purpose can be strong evidence of the existence of an enterprise. Such evidence underscores the common purpose of the associates and their ability to function as a continuing unit, even as individual members come and go.

tion of the definition of enterprise to require some additional proof. As the Court recognized in *Turkette*, in addressing this very point, "[l]anguage in a statute is not rendered superfluous merely because in some contexts that language may not be pertinent." 452 U.S. at 583 n.5. The concept of "enterprise" plays a factually and legally distinct role from "pattern" in many contexts. If the evidence used to prove the two "coalesce" in certain cases, *id.* at 583, it is no cause for reading new requirements into RICO, as petitioner urges the Court to do here.[9]

The ability of RICO to reach groups of criminals who operate over time even without formal structure or relationships other than their criminal endeavors is critical to achieving RICO's goals. Cf., *e.g.*, *United States* v. *Elliott*, 571 F.2d 880, 898 n.19 (5th Cir.) (noting that "the enterprise operated in a manner calculated to minimize direct evidence of association"), cert. denied, 439 U.S. 953 (1978). This Court has recognized that "Congress was concerned in RICO with long-term criminal conduct," and that that concern—together with the list

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[9] In *Turkette*, the government argued that "[w]e do not suggest that any two sporadic and isolated offenses by the same actor or actors *ipso facto* constitute an 'illegitimate' enterprise; rather the existence of the enterprise as an independent entity must also be shown." 452 U.S. at 583 n.5. The Court's response was that, even if "that were not the case," it would not matter because the "enterprise" element need not add something in *all* contexts in order to avoid superfluity. *Ibid.* And the "enterprise" element indisputably adds a unique requirement where the enterprise is a legal entity or an entity with mixed lawful and unlawful functions. Notably, the government's analysis in *Turkette* preceded this Court's holding in *H.J. Inc.* that a RICO pattern requires continuity plus relationship. The evidence establishing those additional features of a "pattern," in most cases, does provide sufficient proof of an enterprise when the enterprise is wholly illegal.

of predicate racketeering offenses that Congress has specifically targeted—limits the scope of the statute through "RICO's key requirement of a *pattern* of racketeering." *H.J. Inc.*, 492 U.S. at 236, 242 (emphasis added) (noting that RICO's expansive uses appear primarily to result from "the breadth of the predicate offenses" in Section 1961(1) and the "concept of 'pattern'") (quoting *Sedima*, 473 U.S. at 500); cf. *Agency Holding Corp.* v. *Malley-Duff & Assocs., Inc.*, 483 U.S. 143, 154 (1987) (A "*pattern* of racketeering" lies at "the heart of any RICO" charge.). "Predicate acts extending over a few weeks or months and threatening no future criminal conduct do not satisfy [the pattern] requirement" and lie beyond the reach of the Act. *H.J. Inc.*, 492 U.S. at 242. But where, as here, a pattern of crimes is committed by a group of individuals dedicated to the commission of that activity and operating together to achieve it, RICO's purposes are fully engaged.

c. The government's evidence of a defendant's pattern of racketeering activity may accordingly lead the jury to infer an "enterprise." Where the defendant's racketeering activities are performed jointly with the same core group of individuals and follow a sufficiently identifiable "pattern," a jury may infer that the group has joined as associates in fact for the very purpose of committing those crimes. In that sense, as *Turkette* recognizes, "the proof used to establish these separate elements may in particular cases coalesce." 452 U.S. at 583. A particular jury might not make that circumstantial inference, however, in the absence of additional evidence to conclude that an enterprise exists. Thus, the government will often produce direct or circumstantial evidence beyond a particular defendant's pattern of racketeering activity to establish the existence of an

enterprise and link the defendant's pattern of racketeering to the enterprise.

That evidence, for instance, may address activities undertaken by other alleged group members and the relationship of those activities to the defendant's pattern of conduct; the degree of continuity of core participants in such activities; and other factors illustrating ongoing, purposeful, and coordinated conduct.[10] Evidence of an "ascertainable structural hierarchy" (J.A. 95), which petitioner would have required the jury to find (J.A. 102), could add to the government's proof but "the existence of an association-in-fact is oftentimes more readily proven by "what it *does* * * * than by abstract analysis of its structure." *United States* v. *Bagaric*, 706 F.2d 42, 56 (2d Cir.), cert. denied, 464 U.S. 840, and 464 U.S. 917 (1983). Just as one may deduce the existence of a marital or other relationship from observing the related parties interact, a jury may properly infer the existence of an ongoing criminal association-in-fact from the conduct of its membership.

Many factors that can prove an enterprise would also facilitate the racketeering activity, but those factors are neither identical to the racketeering acts themselves nor

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[10] Numerous factors may be relevant, for example: the purchase or retention of tools used by members in their criminal activity; patterns of financial transactions or possession of property; the maintenance of records associated with criminal activities; efforts to develop new opportunities to engage in crime or to solicit customers for criminal services; the manner in which members maintain lines of communication; processes used to plan operations and make group decisions; profit sharing from criminal activity; post-racketeering-act efforts to avoid detection or to intimidate witnesses; members' joint participation in lawful activities or in crimes other than acts of racketeering; and the association of its members apart from the criminal activities in which they engage.

essential for the commission of those acts. Indeed, an enterprise's structural make-up would also presumably be designed to facilitate its criminal objectives. It is clear from *Turkette*'s holding that an association-in-fact enterprise may be "wholly criminal," 452 U.S. at 583, that the government is not required to show that a criminal enterprise has some structure unrelated to its criminal objectives in order to demonstrate that the existence of that enterprise. See *Odom* v. *Microsoft Corp.*, 486 F.3d 541, 551 (9th Cir.) (en banc), cert. denied, 128 S. Ct. 464 (2007); *United States* v. *Kragness*, 830 F.2d 842, 857 (8th Cir. 1987); *United States* v. *Riccobene*, 709 F.2d 214, 223-224 (3d Cir.), cert. denied, 464 U.S. 849 (1983).

d. In support of his position that RICO requires that an enterprise have an ascertainable structure separate from the "pattern of racketeering activity," petitioner focuses (Br. 5, 10) on the Court's explanation in *Turkette* that "[t]he 'enterprise' * * * is an entity separate and apart from the pattern of activity in which it engages" and its "existence * * * at all times remains a separate element which must be proved by the government." 452 U.S. at 583. That passage "is merely a statement of the obvious: The enterprise and its activity are two separate things. One is the enterprise. The other is its activity." *Odom*, 486 F.3d at 551. And, while *Turkette* makes clear that the existence of an enterprise is an element of a RICO offense that, like any element of any offense, must be proved by the government, it plainly "is not a statement that an associated-in-fact enterprise must have some kind of separate structure." *Ibid.*

Even the approaches adopted by the four courts of appeals that require that an association-in-fact enterprise have an existence separate from the predicate acts of racketeering of its members lend little support to pe-

titioner. Of those four, only the Eighth Circuit has stated that proof of an ascertainable structure is needed to establish that an enterprise exists separately from such acts. See, *e.g.*, *Asa-Brandt, Inc.* v. *ADM Investor Servs., Inc.*, 344 F.3d 738, 752 (8th Cir. 2003); *United States* v. *Bledsoe*, 674 F.2d 647, 665 (8th Cir.), cert. denied, 459 U.S. 1040 (1982). The other three require proof of some ascertainable structure but do not impose the requirement as a means of showing that the enterprise has an existence separate from its members' racketeering acts. Those courts instead conclude that separateness is established by other factors. See, *e.g.*, *United States* v. *Console*, 13 F.3d 641, 651-652 (3d Cir. 1993), cert. denied, 511 U.S. 1076, and 513 U.S. 812 (1994); *United States* v. *Sanders*, 928 F.2d 940, 944 (10th Cir.), cert. denied, 502 U.S. 845 (1991); *United States* v. *Tillett*, 763 F.2d 628, 632 (4th Cir. 1985). Thus, in *Console*, the court found its "separate existence" requirement to be satisfied where the association-in-fact enterprise "coordinated the commission of multiple predicate offenses * * * and continued to provide legitimate services during the period in which they were engaged in racketeering activities." 13 F.3d at 652. In *Tillett*, the requirement was found to be satisfied by evidence that the enterprise set up a legitimate business as a front for its smuggling operation, purchased trucks and equipment, and formed a corporation to purchase a boat. 763 F.2d at 632. And in *Sanders*, the requirement was found to be satisfied because "the group continued to exist and thrive on heroin sales without any particular contribution of individuals and conducted numerous predicate acts of racketeering." 928 F.2d at 944.

Even the Eighth Circuit, despite stating that an association-in-fact enterprise must have an ascertainable

structure distinct from that inherent in the conduct of the predicate acts, routinely considers factors other than the enterprise's structure in determining whether the enterprise satisfies the "separate existence" requirement. See, *e.g.*, *United States* v. *Crenshaw*, 359 F.3d 977, 991 (2004) ("patterns of retaliation and intimidation undertaken to protect and defend the enterprise's business and associates"); *United States* v. *Keltner*, 147 F.3d 662, 668-669 (use in later robberies of items stolen in earlier robberies), cert. denied, 525 U.S. 1032 (1998); *id.* at 669 ("several acts of intimidation and solicitation of perjury to protect [members'] identit[ies]"); *United States* v. *Davidson*, 122 F.3d 531, 535 ("family and social relationships" between members) (citation omitted), cert. denied, 522 U.S. 1034 (1997), and 523 U.S. 1033 (1998); *ibid.* ("numerous acts of retaliation and intimidation" and an "attempt to involve a local sheriff in a murder-for-hire"); *United States* v. *Darden*, 70 F.3d 1507, 1521 (1995) ("shar[ing of] information [by members] to protect their drug trade, avoid apprehension, and defeat competitors"), cert. denied, 517 U.S. 1149, and 518 U.S. 1026 (1996); *United States* v. *Leisure*, 844 F.2d 1347, 1363 (1987) ("family and social relationships between members of group"), cert. denied, 488 U.S. 932, 960 (1988); *ibid.* ("concerted attempt to gain control of the local unions, which can be viewed in complete isolation from the group's pattern of racketeering activity"); *Kragness*, 830 F.3d at 857 ("activities aside from the commission of the alleged predicate acts"); *ibid.* (purchases of property and planes suitable for drug flights, and rental of hangars and a house) *id.* at 857-858 (use of banking and financial services).

Indeed, the Eighth Circuit has held that the "separate existence" requirement may be satisfied where "a

group engaged in a diverse pattern of crimes," notwithstanding that the crimes are all charged as predicate racketeering acts. *Bledsoe*, 674 F.2d at 665. Thus, in *United States* v. *Lemm*, 680 F.2d 1193 (8th Cir. 1982), cert. denied, 459 U.S. 1110 (1983), where the predicate acts consisted of arson and mail fraud involving the delivery of insurance claims, the court held that the "separate enterprise" requirement was satisfied in that "[t]he arson ring, through hand-delivery of insurance claims, could have conducted its activities without any predicate acts of mail fraud. In other words, if we eliminate for purposes of argument the predicate acts of mail fraud, the evidence still shows an on-going structure which engaged in legitimate purchases and repairs of property as well as acts of arson." *Id.* at 1201. In short, petitioner's notion that any "separate existence" requirement may be satisfied only by proof that the enterprise had an ascertainable structure is not one that appears to be followed in practice by any court of appeals.

3. An independent "ascertainable structure" requirement is not necessary to distinguish between conspiracy and RICO offenses

Petitioner contends (Br. 11-13, 47-49) that, without an "ascertainable structure" requirement, every long-term conspiracy under 18 U.S.C. 371 to commit predicate racketeering acts listed in Section 1961(1) would give rise to a RICO enterprise, and every participant in such a conspiracy would be a RICO offender. Petitioner's concern that "vast amounts of conspiracy law" would be "RICO-ize[d]," Br. 48, misunderstands the nature of both conspiracy and a RICO offense under Section 1962(c).

a. First, a conspiracy violating Section 371 will not necessarily give rise to an enterprise. "Conspiracy is an inchoate offense, the essence of which is an *agreement* to commit an unlawful act." *Iannelli* v. *United States*, 420 U.S. 770, 777 (1975) (emphasis added). Because a conspiracy is complete under Section 371 once such an agreement is formed with the requisite scienter and an overt act is taken in pursuit of the conspiracy, criminal liability attaches "regardless of whether the crime agreed upon actually is committed." *United States* v. *Feola*, 420 U.S. 671, 694 (1975); see *Salinas* v. *United States*, 522 U.S. 52, 63 (1997). The offense accordingly has no temporal requirement and may be committed in the brief span it requires for two people to agree on a criminal object and to take a step toward its effectuation. No *actual* degree of coordinated effort is required.

By contrast, an association-in-fact enterprise, as *Turkette* makes clear, is an *organization* or *entity*—whether formal or informal—that has an "ongoing" existence and whose members "*function* as a continuing unit." See 452 U.S. at 583 (emphasis added). While the organization need not possess any ascertainable structure, its members must actually coordinate their efforts to achieve the *raison d'etre* of their association in fact: the "common purpose of engaging in a course of conduct." See *ibid.* Thus, conspiracies to commit predicate racketeering acts have the potential to evolve into association-in-fact enterprises if their members take coordinated actions to achieve that end.

b. In any event, petitioner is mistaken in his belief (Br. 11, 47) that a RICO offense carrying a "drastically enhanced penalty" will result from mere conspiracies violating Section 371. A RICO offense under Section 1962(c), requires much more than just the existence of

an enterprise; it requires that the defendant participate in the conduct of the enterprise's affairs through an actual "pattern of racketeering activity." That pattern, as noted, requires the defendant to commit at least two (or more) actual predicate racketeering offenses listed in Section 1961(1) that are both "related" and amount to or pose a threat of continuing criminal activity. *H.J. Inc.*, 492 U.S. at 237, 239-243. Not every long-term predicate conspiracy will satisfy RICO's pattern element. And if one does, a defendant can hardly complain that his actual pattern of racketeering acts triggered a RICO prosecution.

c. Petitioner contends further (Br. 50) that an "ascertainable structure" requirement is needed to maintain a distinction between a Section 1962(c) offense and a RICO conspiracy under Section 1962(d). A RICO conspiracy to violate Section 1962(c) involves an agreement to "further an endeavor which, if completed, would satisfy all of the elements of a substantive criminal offense" under Section 1962(c). *Salinas*, 522 U.S. at 65. Where an association-in-fact enterprise is legitimate, the enterprise will obviously be distinct from any agreement to conduct it through a pattern of racketeering. The situation is somewhat different, however, for illegitimate association-in-fact enterprises. A criminal association-in-fact enterprise ordinarily may subsume one or more conspiracies to commit substantive crimes, because such an enterprise is defined in part by the common objective of its members to commit such offenses together or to facilitate one another's commission of criminal acts. For this same reason, an illegitimate association-in-fact enterprise (at least where its very purpose is to commit RICO-qualifying offenses) will ordinarily subsume a RICO conspiracy. This Court essentially recognized as

much when it observed in *Salinas* that in such cases it may be "somewhat difficult to determine just where the enterprise ends and the [RICO] conspiracy begins, or, on the other hand, whether the two crimes are coincident in their factual circumstances." *Ibid.* But, contrary to petitioner's view, an illegitimate association-in-fact enterprise would be no less coincident with a RICO conspiracy if the enterprise had an ascertainable structure than if it did not; if anything, the existence of such a structure would merely provide additional proof of the RICO conspiracy.

Petitioner's reliance (Br. 13, 47) on *United States* v. *Santos*, 128 S. Ct. 2020 (2008), is misplaced for similar reasons. The "merger" concern expressed by the plurality and Justice Stevens in *Santos* arose from the view of those Justices that commission of a predicate gambling offense would virtually always be a violation of the money-laundering statute, 18 U.S.C. 1956. *Santos*, 128 S. Ct. at 2026-2027 (plurality opinion); *id.* at 2033 (Stevens, J., concurring). But it is certainly not the case that any series of crimes committed by conspirators would almost always violate RICO. And to the extent that *RICO* conspirators who actually carry out their crimes would also violate RICO's substantive provision, nothing in that conclusion is problematic. See *Iannelli*, 420 U.S. at 777-778 ("[I]t is well recognized that in most cases separate sentences can be imposed for the conspiracy to do an act and for the subsequent accomplishment of that end.").

4. An independent "ascertainable structure" requirement finds no support in this Court's Turkette, Reves, *and* H.J. Inc. *decisions*

Petitioner's leading arguments (Br. 24-37) parse the text of a series of this Court's RICO decisions, using dictionary definitions to construe the "plain language" of those opinions (Br. 24) rather than the plain language of the statute. But "the language of an opinion is not always to be parsed as though we were dealing with language of a statute" and, instead, must properly be "read in context." *Reiter* v. *Sonotone Corp.*, 442 U.S. 330, 341 (1979); accord *Hoffman Plastic Compounds, Inc.* v. *NLRB*, 535 U.S. 137, 159 (2002) (Breyer, J., dissenting); *CBS* v. *FCC*, 453 U.S. 367, 385 (1981). When read as a whole, neither *Turkette*, *supra*, *Reves* v. *Ernst & Young*, 507 U.S. 170 (1993), nor *H.J. Inc.*, *supra*, supports petitioner's "ascertainable structure" requirement.

a. As previously explained, *Turkette* recognized that Congress placed "no restriction upon the associations embraced by the definition" of enterprise, which includes even "informal" organizations of individuals associated in fact to engage in a criminal course of conduct. 452 U.S. at 580, 583. The fact that *Turkette* describes an "enterprise" as an "entity" or "organization" (terms that do not appear in RICO's text) simply does not speak to whether the entity or organization must have "a cohesive structure" beyond that needed to implement the coordinated conduct of its members. Indeed, the district court's instruction that the jury must find "an ongoing organization with some sort of framework, formal or informal, for carrying out its objectives," J.A. 112, more than satisfied *Turkette*.

b. *Reves* likewise does not support petitioner's contention. The "enterprise" in *Reves* was a farmer's coop-

erative which, through its board of directors and general manager, hired an accounting firm to conduct its annual audit, and the accounting firm was subsequently sued under RICO's civil remedy provisions for its conduct connected with the audit. The Court concluded that a person may not be liable for a RICO violation under Section 1962(c) unless that person "participate[d] in the operation or management of the enterprise itself." *Reves*, 507 U.S. at 185. In doing so, the Court expressly declined to decide what degree of direction of an enterprise's affairs is needed to satisfy the so-called "operation or management" test, *id.* at 184 n.9, but explained that "significant control" is unnecessary and noted that "[a]n enterprise is 'operated' not just by upper management but also by lower-rung participants in the enterprise who are under the direction of upper management." *Id.* at 179 n.4, 184 (citation omitted).

Petitioner seizes upon the Court's use of the words "operate" and "management" to conclude that "*Reves* plainly contemplates the existence of a structured enterprise," Br. 32-34, but the Court's decision merely reflects unremarkable fact that some RICO enterprises will be structured hierarchically, like the farmer's cooperative in *Reves*. The Court's "operation and management" test does not presuppose that all RICO enterprises will have ascertainable structures. A group of individuals may "operate" a criminal enterprise—*i.e.*, plan and carry out the enterprise's criminal activity—without having a leader or other discernible structural identity. Indeed, even in the context of structured organizations, the courts of appeals have recognized that a person may

operate an enterprise without having a supervisory position.[11]

c. Petitioner's reliance (Br. 34-36) on *H.J. Inc.* is equally misplaced. *H.J. Inc.* held that predicate racketeering acts will constitute a "pattern" under RICO only if they are "related" and "themselves amount to, or * * * otherwise constitute a threat of, *continuing* racketeering activity," explaining that a "threat of continuity" is established, for instance, "where the predicates can be attributed to a defendant operating as part of a long-term association that exists for criminal purposes." 492 U.S. at 239-240, 242-243. The fact that a pattern must involve a threat of or continuing racketeering activity, however, does not support petitioner's conclusion that such a requirement "intrinsically connotes structure." Br. 35. A criminal association may enjoy a long life as a cohesive unit while lacking any formalistic structure, and nothing in *H.J. Inc.* suggests that an independent showing of structure is required in order to prove continuity.

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[11] See, *e.g.*, *United States* v. *Posada-Rios*, 158 F.3d 832, 856 (5th Cir. 1998) (*Reves* does not require that a defendant have "'decision-making' power," but only that he "'take part in' the operation of the enterprise.") (citation omitted), cert. denied, 526 U.S. 1031, 1080, 1137 (1999); *United States* v. *Houlihan*, 92 F.3d 1271, 1298-1299 (1st Cir. 1996) (upholding instruction that jury could find that the defendant participated in the conduct of the enterprise even though he had no part in the management or control of the enterprise where defendant was an "insider[]" who was "integral to carrying out the enterprise's racketeering activities"), cert. denied, 519 U.S. 1118 (1997); *United States* v. *Starrett*, 55 F.3d 1525, 1548 (11th Cir. 1995) (Those who "implement[]" decisions made by others are liable under the "operation or management" test.), cert. denied, 517 U.S. 1111, 1127 (1996).

5. Petitioner's textual analysis of Section 1961(4), like the title and purpose of RICO, does not support an independent "ascertainable structure" requirement

Petitioner's textual analysis (Br. 38-39, 40-44) focuses on two discrete aspects of Section 1961(4)'s definition of enterprise and RICO's statutory title, none of which supports petitioner's "ascertainable structure" requirement.

a. Petitioner contends (Br. 41-42) that the conjunction "although" in the phrase "group of individuals associated in fact although not a legal entity" reflects that such a group must have an ascertainable structure because, in petitioner's view, the text following "although" implies that the group is just "structured without the aid of legally defined structural forms such as the business corporation." *Limestone Dev. Corp.* v. *Village of Lemont*, 520 F.3d 797, 804-805 (7th Cir. 2008). But the category of association-in-fact enterprises that are "not legal entit[ies]" encompasses both associations-in-fact that have an ascertainable structure and those that do not. The words "although not a legal entity" merely bring within the definition of "enterprise" associative entities that have no independent legal existence. See *Turkette*, 452 U.S. at 582. The notion that association-in-fact enterprises must in some particular way be *like* legal entities does not follow from the text which applies only to enterprises that are *not* legal entities.

Petitioner contends that his reading is "reinforced by the fact that before 'any union or group of individuals associated in fact' . . . appears a list of [formally structured] legal entities" including partnerships and corporations, Br. 44 (quoting *Limestone Dev. Corp.*, 520 F.3d at 805) (brackets in original). But Section 1961(4)'s list of legal entities also includes "any individual" and there-

fore is not confined to entities displaying a "structural form." Consequently, even if the non-legal entities in Section 1961(4) were limited by traits of the legal entities that precede them in that provision, it "would be improper to engraft this characteristic upon the second category of enterprises" because it "is not a universal characteristic of the specifically listed enterprises." *Turkette*, 452 U.S. at 582 n.4.

Turkette, moreover, rejected the argument that the scope of the association-in-fact clause should be limited by the list of legal entities in Section 1961(4)'s opening clause. The court of appeals in *Turkette* had reasoned that "because each of the specific enterprises enumerated in § 1961(4) is a 'legitimate' one, the final catchall phrase—'any union or group of individuals associated in fact'—should also be limited to legitimate enterprises." 452 U.S. at 581. This Court, however, held that the principal flaw in that reasoning was the assumption that an association-in-fact enterprise, as described in the second clause of Section 1961(4), constitutes a "more general" category than the legal entities listed in the opening clause. *Id.* at 582. "Each category describes a *separate* type of enterprise to be covered by the statute—those that are recognized as legal entities and those that are not," and therefore that "[t]he latter [category] is not a more general description of the former." *Ibid.* (emphasis added).

b. Petitioner also relies on the word "union" in the second clause of Section 1961(4). Building from the premise that "union" means "labor union," petitioner argues (Br. 42-44) that, because labor unions have ascertainable structures, so must association-in-fact enterprises. Even assuming that Congress intended "union" to refer solely to "labor unions" in Section 1961(4), peti-

tioner incorrectly concludes that the phrase "any * * * group of individuals associated in fact" must, like a labor union, have some formalized structure. Labor unions may have any number of characteristics, including leadership by election, established headquarters, formal bylaws, and management hierarchy. The simple fact that the phrase "group of individuals" follows "union" in Section 1961(4) is an unsound basis from which to infer that Congress intended such a "group" to share in any one those characteristics.

c. Petitioner contends (Br. 38-39) that the word "organizations" in the title of Chapter 96 of Title 18 ("Racketeer Influenced and Corrupt Organizations," 84 Stat. 941) "is synonymous with 'structure.'" The word "organization," however, cannot carry the weight petitioner would place upon it. See p. 19 & n.4, *supra*. Even if it could, "[t]he title of a statute . . . cannot limit the plain meaning of the text." *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (citation omitted). Especially where the statutory text is "complicated and prolific," as it is in RICO, it may contain provisions that are "unreflected" in the title. *Brotherhood of R.R. Trainmen* v. *Baltimore & Ohio R.R.*, 331 U.S. 519, 528 (1947). Indeed, this Court has previously rejected the view that RICO's "broad language should be read narrowly" to limit the statute to its purported purpose, "as revealed in the Act's title," of combating organized crime. *H.J. Inc.*, 492 U.S. at 245-246.

6. The purpose of the RICO statute does not support an independent "ascertainable structure" requirement

Petitioner's reliance (Br. 53-58) on the statutory purposes reflected in RICO's preamble and legislative history is misplaced for similar reasons. Petitioner argues

that RICO was intended to eradicate organized crime and infers from that objective that the statute's reach must be limited to organized-crime-type enterprises—*i.e.*, enterprises with an independent ascertainable structure. Br. 53-54. Of course, organized crime was Congress's "major target" in enacting RICO. *H.J. Inc.*, 492 U.S. at 245. That fact, however, does not support petitioner's "ascertainable structure" requirement.

a. The "authoritative statement [of Congress] is the statutory text." *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 568 (2005). "Extrinsic materials have a role in statutory interpretation only to the extent they shed a reliable light on the enacting Legislature's understanding of otherwise ambiguous terms." *Ibid.* As shown above, the language of RICO's operative text is broad and unambiguous with respect to an "ascertainable structure" requirement. Absent any relevant ambiguity in that text, "th[e] first canon is also the last: 'judicial inquiry is complete.'" *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 254 (1992) (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)).

b. In any event, petitioner's contentions are foreclosed by this Court's decision in *H.J. Inc.* The Court there held that a RICO defendant's "pattern of racketeering activity" need not be characteristic of organized crime or an organized-crime-type perpetrator. 492 U.S. at 244-249. The Court's rationale is fatal to petitioner's argument that RICO enterprises must be characteristic of organized crime. First, the Court's rejected an organized-crime limitation because such a limitation "would seem to require proof that the racketeering acts were the work of an association or group, rather than of an individual acting alone," a requirement not imposed by the text of the statute. *Id.* at 244. Second, the Court

rejected the proposed limitation on the ground that RICO is not like other statutes and other titles of the OCCA that are expressly limited to organized-crime contexts. *Id.* at 244-245.[12]

Finally, notwithstanding its finding that the legislative debates and reports focused on the need to combat organized crime, *H.J. Inc.*, 492 U.S. at 245, the Court concluded that an organized crime limitation on RICO's pattern element would be "at odds with the tenor of [the statute's] legislative history." *Id.* at 244. That legislative history shows that Congress deliberately rejected an organized crime limitation on the statute's scope, opting instead for "language capable of extending beyond organized crime." *Id.* at 246. The Court explained that, while "[t]he occasion for Congress's action was the perceived need to combat organized crime," Congress "for cogent reasons chose to enact a more general statute, one which, although it had organized crime as its focus, was not limited in application to organized crime."

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[12] The Court cited two provisions of the OCCA: Section 501, 84 Stat. 933 (repealed 1984) (stating that the Attorney General may provide for the security of witnesses "in legal proceedings against any person alleged to have participated in organized criminal activity"), and Section 601(a), 84 Stat. 934 (18 U.S.C. 3503(a) (2000)) (repealed 2002) (permitting the deposition of a witness to preserve testimony for a legal proceeding upon motion by the Attorney General certifying that "the legal proceeding is against a person who is believed to have participated in an organized criminal activity"). *H.J. Inc.*, 492 U.S. at 244-245. The Court also referred to the Omnibus Crime Control and Safe Streets Act of 1968, § 601(b), Pub. L. No. 90-351, 82 Stat. 209 (defining "organized crime" as the "unlawful activities of the members of a highly organized, disciplined association engaged in supplying illegal goods and services, including but not limited to gambling, prostitution, loan sharking, narcotics, labor racketeering, and other unlawful activities of members of such organizations"). 492 U.S. at 245.

Id. at 248; cf. H.R. Rep. No. 1549, 91st Cong., 2d Sess. 56 (1970) (explaining that RICO will reach the "infiltration of *any* associative group by any ['person']" because it "defines 'enterprise' to include associations in fact, as well as legally recognized associative entities") (emphasis added); cf. also 18 U.S.C. 1961(3) (defining "person").

Petitioner does not argue that a RICO enterprise must be an organized crime entity; he argues only that it must possess an attribute characteristic of such an entity. But the Court in *H.J. Inc.* rejected a similar argument—that "a defendant's racketeering activities form a pattern only if they are *characteristic* either of organized crime in the traditional sense, or of an organized-crime-type perpetrator." 492 U.S. at 243 (emphasis added). Moreover, the Court in *H.J. Inc.* concluded that a RICO pattern need not be indicative of an organized crime perpetrator "in either a traditional *or functional* sense." *Id.* at 244 (emphasis added). *H.J. Inc.* therefore stands for the proposition that the broad scope of the RICO statute may not be limited by reference to the statute's overriding purpose of eradicating organized crime.

7. Petitioner's remaining contentions are without merit

Petitioner contends (Br. 44-46, 50-51, 63-69) that two statutory provisions (18 U.S.C. 1955 and 1959) indicate that a RICO enterprise must satisfy petitioner's "ascertainable structure" requirement and that the rule of lenity and doctrine of constitutional avoidance counsel in favor of that restriction. Each of those contentions is misplaced.

a. First, the Violent Crimes in Aid of Racketeering statute, 18 U.S.C. 1959, makes it unlawful to commit a violent crime in return for anything of pecuniary value

from "an enterprise engaged in racketeering activity," or for the purpose of gaining entrance to or maintaining or increasing one's position in such an "enterprise." 18 U.S.C. 1959(a). Borrowing from RICO, the statute defines "enterprise" as "includ[ing] any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity." 18 U.S.C. 1959(b)(2). Petitioner argues that a Section 1959 enterprise must have an ascertainable structure in order for outsiders to be able to gain entry to it or for its members to be able to maintain or increase their positions in it. He then concludes that, if a Section 1959 enterprise must have an ascertainable structure, so must a RICO enterprise. Br. 44-46.

Petitioner's premise is incorrect. A Section 1959 association-in-fact enterprise need not have an independent ascertainable structure in order for the statute to be violated. For example, a member of an enterprise lacking any such structure may violate the statute by seeking to take control of the enterprise by violence, thereby imposing structure upon it. Similarly, an outsider may gain admittance to an enterprise, an insider may maintain his membership in an enterprise, and a person may receive something of pecuniary value from an enterprise even if the enterprise is an association-in-fact that lacks an ascertainable structure.[13]

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[13] Even if the Congress that enacted Section 1959 in 1984 had assumed that RICO's definition of "enterprise" contemplated that an enterprise must *always* possess an ascertainable structure, that post-enactment understanding of RICO's provisions would be "beside the point," *Almendarez-Torres* v. *United States*, 523 U.S. 224, 237 (1998), because a subsequent Congress cannot "supplant the contemporaneous intent" of the Congress that enacted RICO in 1970. *Waterman S.S.*

b. Petitioner argues (Br. 50-51) that, without an "ascertainable structure" requirement, RICO "would swallow[,] if not negate," the federal gambling statute, 18 U.S.C. 1955. That statute makes it a crime to operate a gambling business that violates the law of the State in which it is conducted; involves five or more persons who conduct, finance, manage, supervise, direct, or own the business; and remains in continuous operation for more than 30 days or has a gross revenue of $2000 in any single day. According to petitioner (Br. 51), "absent a structured enterprise requirement, prosecutors could evade § 1955's five-or-more-managers threshold * * * simply by charging two months or even two lucrative days of group gambling as a § 1962(c) offense." That is incorrect.

If the government brought a RICO prosecution under Section 1962(c) alleging a Section 1955 offense as a predicate racketeering act, it would have to prove the defendant violated Section 1955 by establishing every element of that crime, including the "five-or-more-managers threshold." Alternatively, if the government

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Corp. v. *United States*, 381 U.S. 252, 269 (1965); see *Russello*, 464 U.S. at 26.

The internal policies reflected in the *U.S. Attorneys' Manual* likewise cannot alter the meaning of the statute. Those policies, in any event, recognize that "the statutory definition of 'enterprise' [in Section 1959] is very broad," but, as matter of prosecutorial discretion, provide that "[n]o prosecution under [S]ection 1959 will be approved unless the *enterprise* has an identifiable structure and purpose apart from the racketeering activity and crimes of violence it is engaged in." Executive Office for U.S. Attorneys, U.S. Dep't of Justice, *United States Attorneys' Manual* § 9.110-812(C) (1997) (emphasis added). That policy, by its own terms, contemplates that not all enterprises will have an identifiable structure and purpose apart from an associated pattern of racketeering.

charged multiple state felony gambling offenses as the relevant predicate acts (see 18 U.S.C. 1961(1)(A)), and those state-law offenses did not include a similar management requirement as an element of the crime, the government would not need to prove management participation. By specifically authorizing the use of state gambling offenses as RICO predicates, however, Congress expressed its intent to allow RICO prosecutions of gambling enterprises that, while meeting RICO's "ongoing organization" and "continuing unit" requirements, might not satisfy Section 1955's "five-or-more managers threshold." That by no means "negates" the effect of Section 1955. And, even if it did, it would be a congressionally authorized negation that would not be remedied by petitioner's "ascertainable structure" requirement (which itself would not require a five-or-more-managers rule).

c. Finally, petitioner's reliance (Br. 63-69) on the rule of lenity and the principle of constitutional avoidance is misplaced.

i. The rule of lenity applies only if, "at the end of the process of construing what Congress has expressed," *Callanan* v. *United States*, 364 U.S. 587, 596 (1961), "there is a grievous ambiguity or uncertainty in the statute." *Muscarello* v. *United States*, 524 U.S. 125, 139 (1998) (internal quotation marks and citation omitted). Neither "[t]he mere possibility of articulating a narrower construction," *Smith* v. *United States*, 508 U.S. 223, 239 (1993), nor the "existence of some statutory ambiguity" is "sufficient to warrant application of th[e] rule." *Muscarello*, 524 U.S. at 138. Instead, the rule of lenity applies "only if, after seizing everything from which aid can be derived, [the Court] can make no more

than a guess as to what Congress intended." *Ibid.* (internal quotation marks and citation omitted).

There is no need to resort to the rule of lenity because the statute is not ambiguous; it is simply—and unambiguously—broad. *Sedima*, 473 U.S. at 499. And there is no textual warrant for the courts to add an "ascertainable structure" gloss that is itself an ambiguous and "amorphous concept." See *H.J. Inc.*, 492 U.S. at 241 n.3 (citation omitted).

ii. While statutes should be construed, where possible, to avoid constitutional questions, see *Salinas*, 522 U.S. at 59-60, that interpretive cannon has no application here. Petitioner contends (Br. 64-66) that, without an "ascertainable structure" requirement, the RICO statute would unconstitutionally remove the enterprise element from the jury's consideration and render RICO unconstitutionally vague. Both arguments rest on the premise that a structural requirement is necessary to prevent RICO's enterprise and "pattern of racketeering activity" elements from merging. But, as shown above, the absence of such a requirement presents no "merger" problem.[14]

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[14] One of petitioner's amici contends that the Court should adopt petitioner's interpretation of "enterprise" in order to avoid the federal prosecution of traditionally local crimes. Center on Admin. of Crim. Law Amicus Br. 17-28. This Court, however, rejected such an interpretive approach in *Turkette*, concluding that, even if a disputed interpretation of RICO would "substantially alter the balance between federal and state enforcement of criminal law," Congress was "well aware that it was entering a new domain of federal involvement" when it enacted RICO and "the courts are without authority to restrict the application of the statute" where Congress acts within its legislative power. 452 U.S. at 586-587. This Court has repeatedly revisited RICO's text and has never adopted a narrowing construction to accommodate such concerns. See, *e.g.*, *Bridge*, 128 S. Ct. at 2145 (addressing RICO's purport-

II. THE EVIDENCE ESTABLISHED A VALID RICO ENTERPRISE EVEN IF THE ORGANIZATION LACKED AN INDEPENDENT ASCERTAINABLE STRUCTURE

In this case, the district court properly denied petitioner's request for an "ascertainable structure" instruction and correctly charged the jury that an enterprise need not have any "particular or formal structure." J.A. 112. The evidence, moreover, was sufficient to establish that the charged association-in-fact qualified as a RICO enterprise. Regardless of whether it lacked an ascertainable structure, petitioner's enterprise had a common purpose and functioned as a continuing unit.

The enterprise, as established by the evidence, consisted of an association informally organized for the purpose of committing bank theft. The organization engaged in dozens of successful and attempted bank thefts in several States over a nine-year period, reflecting a degree of sophistication and experience typical of ongoing criminal organizations. The enterprise maintained a consistent core of members throughout its existence, while also having the ability to recruit new members as older ones were incarcerated or moved away. Tr. 664. The members gathered together at a social club in Brooklyn run by one of their own, Tommy Dono, Tr. 308, 501, and they were bound together by their mutual trust in one another's competence and loyalty, Tr. 213-214, 664-665.

Although the enterprise lacked a distinct management structure, it operated in an organized fashion. Members of the group would scout for opportunities to commit night-deposit-box theft based on settled criteria: The targeted boxes were a particular type that the mem-

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ed "'over-federalization' of traditional state-law claims").

bers had developed an expertise in dismounting, Tr. 45, 304-305, 434, 437, and were situated in areas where there was a high volume of cash deposits, such as shopping malls, Tr. 304, 343, 366-373, 439-441. Once a satisfactory opportunity was located, a member of the organization would assume the role of "organizer" and assemble the participants for the operation. Tr. 500-503. Those members participating in a theft would then meet to plan the operation, Tr. 501-502, 679, 929, and decisions were made by agreement rather than dictated by a leader. Tr. 929. The operations would ordinarily take place early in the week, when the boxes still contained weekend deposits. Tr. 45. Each participant played a distinct role in the operations. Some acted as lookouts, equipped with police scanners and walkie-talkies. Tr. 43-44, 47, 48, 212, 317, 337-338, 782. Others, usually two or three, were charged with prying the night-deposit box from the wall and removing the deposit bags. Tr. 43, 299, 317, 334, 359-360, 443-447. On each operation, the members brought along a set of tools: hammers, screwdrivers, ratchet sets, crowbars, chains, and fishing gaffs, as well as the police scanners and walkie-talkies. Tr. 43, 48, 312-313, 317, 320, 337-338, 349-350, 383, 443-445, 666. Following a theft, the participating members would split the proceeds according to a settled arrangement. The group conducted the bank vault burglaries and bank robberies in a similarly coordinated manner. Tr. 323, 455, 528-529.

As the above discussion demonstrates, the organization had a tangible existence beyond the bare minimum necessary to commit the related predicate acts of interstate transportation of bank-theft funds. Its members associated together independent of their racketeering activity; had a meeting place; recruited new members;

retained tools of their illicit trade, Tr. 213; had a routine for developing new bank theft opportunities, for planning operations, and for making decisions; retained the ability to assemble and coordinate their members to conduct bank thefts as opportunities arose; and had an arrangement for dividing the proceeds of their operations. Petitioner's characterization of the group's operations as "*ad hoc* and impromptu," Br. 18, does not comport with the evidence in this case. And on the record evidence, there is no basis for overturning the jury's conclusion that the prosecution established a RICO enterprise.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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APPENDIX

1. The Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. 1961 *et seq*., as amended, provides in pertinent part:

§ 1961. Definitions

As used in this chapter—

(1) "racketeering activity" means (A) any act or threat involving murder, kidnapping, gambling, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), which is chargeable under State law and punishable by imprisonment for more than one year; (B) any act which is indictable under any of the following provisions of title 18, United States Code: Section 201 (relating to bribery), section 224 (relating to sports bribery), sections 471, 472, and 473 (relating to counterfeiting), section 659 (relating to theft from interstate shipment) if the act indictable under section 659 is felonious, section 664 (relating to embezzlement from pension and welfare funds), sections 891-894 (relating to extortionate credit transactions), section 1028 (relating to fraud and related activity in connection with identification documents), section 1029 (relating to fraud and related activity in connection with access devices), section 1084 (relating to the transmission of gambling information), section 1341 (relating to mail fraud), section 1343 (relating to wire fraud), section 1344 (relating to financial institution fraud), section 1425 (relating to the procurement of citizenship or nationalization unlawfully), section 1426 (relating to the reproduction of naturalization or citizenship papers), section 1427 (relating to the sale of natu-

ralization or citizenship papers), sections 1461-1465 (relating to obscene matter), section 1503 (relating to obstruction of justice), section 1510 (relating to obstruction of criminal investigations), section 1511 (relating to the obstruction of State or local law enforcement), section 1512 (relating to tampering with a witness, victim, or an informant), section 1513 (relating to retaliating against a witness, victim, or an informant), section 1542 (relating to false statement in application and use of passport), section 1543 (relating to forgery or false use of passport), section 1544 (relating to misuse of passport), section 1546 (relating to fraud and misuse of visas, permits, and other documents), sections 1581-1592 (relating to peonage, slavery, and trafficking in persons), section 1951 (relating to interference with commerce, robbery, or extortion), section 1952 (relating to racketeering), section 1953 (relating to interstate transportation of wagering paraphernalia), section 1954 (relating to unlawful welfare fund payments), section 1955 (relating to the prohibition of illegal gambling businesses), section 1956 (relating to the laundering of monetary instruments), section 1957 (relating to engaging in monetary transactions in property derived from specified unlawful activity), section 1958 (relating to use of interstate commerce facilities in the commission of murder-for-hire), section 1960 (relating to illegal money transmitters), sections 2251, 2251A, 2252, and 2260 (relating to sexual exploitation of children), sections 2312 and 2313 (relating to interstate transportation of stolen motor vehicles), sections 2314 and 2315 (relating to interstate transportation of stolen property), section 2318 (relating to trafficking in counterfeit labels for phonorecords, computer programs or computer program documentation or packaging and copies of motion pictures or other

audiovisual works), section 2319 (relating to criminal infringement of a copyright), section 2319A (relating to unauthorized fixation of and trafficking in sound recordings and music videos of live musical performances), section 2320 (relating to trafficking in goods or services bearing counterfeit marks), section 2321 (relating to trafficking in certain motor vehicles or motor vehicle parts), sections 2341–2346 (relating to trafficking in contraband cigarettes), sections 2421–24 (relating to white slave traffic), sections 175–178 (relating to biological weapons), sections 229–229F (relating to chemical weapons), section 831 (relating to nuclear materials), (C) any act which is indictable under title 29, United States Code, section 186 (dealing with restrictions on payments and loans to labor organizations) or section 501(c) (relating to embezzlement from union funds), (D) any offense involving fraud connected with a case under title 11 (except a case under section 157 of this title), fraud in the sale of securities, or the felonious manufacture, importation, receiving, concealment, buying, selling, or otherwise dealing in a controlled substance or listed chemical (as defined in section 102 of the Controlled Substances Act), punishable under any law of the United States, (E) any act which is indictable under the Currency and Foreign Transactions Reporting Act, (F) any act which is indictable under the Immigration and Nationality Act, section 274 (relating to bringing in and harboring certain aliens), section 277 (relating to aiding or assisting certain aliens to enter the United States), or section 278 (relating to importation of alien for immoral purpose) if the act indictable under such section of such Act was committed for the purpose of financial gain, or (G) any act that is indictable under any provision listed in section 2332b(g)(5)(B);

(2) "State" means * * * ;

(3) "person" includes any individual or entity capable of holding a legal or beneficial interest in property;

(4) "enterprise" includes any individual, partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity;

(5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity;

(6) "unlawful debt" means * * * ;

(7) "racketeering investigator" means * * * ;

(8) "racketeering investigation" means * * * ;

(9) "documentary material" includes * * * ;

(10) "Attorney General" includes * * * .

§ 1962. Prohibited activities

(a) It shall be unlawful for any person who has received any income derived, directly or indirectly, from a pattern of racketeering activity or through collection of an unlawful debt in which such person has participated as a principal within the meaning of section 2, title 18, United States Code, to use or invest, directly or indirectly, any part of such income, or the proceeds of such income, in acquisition of any interest in, or the establishment or operation of, any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce. A purchase of securities on the open market

for purposes of investment, and without the intention of controlling or participating in the control of the issuer, or of assisting another to do so, shall not be unlawful under this subsection if the securities of the issuer held by the purchaser, the members of his immediate family, and his or their accomplices in any pattern or racketeering activity or the collection of an unlawful debt after such purchase do not amount in the aggregate to one percent of the outstanding securities of any one class, and do not confer, either in law or in fact, the power to elect one or more directors of the issuer.

(b) It shall be unlawful for any person through a pattern of racketeering activity or through collection of an unlawful debt to acquire or maintain, directly or indirectly, any interest in or control of any enterprise which is engaged in, or the activities of which affect, interstate or foreign commerce.

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

(d) It shall be unlawful for any person to conspire to violate any of the provisions of subsection (a), (b), or (c) of this section.

§ 1963. Criminal penalties

(a) Whoever violates any provision of section 1962 of this chapter shall be fined under this title or imprisoned not more than 20 years (or for life if the violation is based on a racketeering activity for which the maximum

penalty includes life imprisonment), or both, and shall forfeit to the United States, irrespective of any provision of State law—

(1) any interest the person has acquired or maintained in violation of section 1962;

(2) any—

(A) interest in;

(B) security of;

(C) claim against; or

(D) property or contractual right of any kind affording a source of influence over;

any enterprise which the person has established, operated, controlled, conducted, or participated in the conduct of, in violation of section 1962; and

(3) any property constituting, or derived from, any proceeds which the person obtained, directly or indirectly, from racketeering activity or unlawful debt collection in violation of section 1962.

The court, in imposing sentence on such person shall order, in addition to any other sentence imposed pursuant to this section, that the person forfeit to the United States all property described in this subsection. In lieu of a fine otherwise authorized by this section, a defendant who derives profits or other proceeds from an offense may be fined not more than twice the gross profits or other proceeds.

* * * * *

2. 18 U.S.C. 371 provides:

Conspiracy to commit offense or to defraud United States

If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner or for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined under this title or imprisoned not more than five years, or both.

If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor.

3. 18 U.S.C. 1955 provides in pertinent part:

Prohibition of illegal gambling businesses

(a) Whoever conducts, finances, manages, supervises, directs, or owns all or part of an illegal gambling business shall be fined under this title or imprisoned not more than five years, or both.

(b) As used in this section—

(1) "illegal gambling business" means a gambling business which—

(i) is a violation of the law of a State or political subdivision in which it is conducted;

(ii) involves five or more persons who conduct, finance, manage, supervise, direct, or own all or part of such business; and

(iii) has been or remains in substantially continuous operation for a period in excess of thirty

days or has a gross revenue of $2,000 in any single day.

* * * * *

4. 18 U.S.C. 1959 provides in pertinent part:

Violent crimes in aid of racketeering activity

(a) Whoever, as consideration for the receipt of, or as consideration for a promise or agreement to pay, anything of pecuniary value from an enterprise engaged in racketeering activity, or for the purpose of gaining entrance to or maintaining or increasing position in an enterprise engaged in racketeering activity, murders, kidnaps, maims, assaults with a dangerous weapon, commits assault resulting in serious bodily injury upon, or threatens to commit a crime of violence against any individual in violation of the laws of any State or the United States, or attempts or conspires so to do, shall be punished—

* * * * *

(b) As used in this section—

(1) "racketeering activity" has the meaning set forth in section 1961 of this title; and

(2) "enterprise" includes any partnership, corporation, association, or other legal entity, and any union or group of individuals associated in fact although not a legal entity, which is engaged in, or the activities of which affect, interstate or foreign commerce.